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April 29, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 25, 2004

Case Number: TSO-0128

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." ¹

I. Background

The individual is employed with a Department of Energy (DOE) contractor in a position that requires the possession of access authorization. In August 2002, the individual was arrested for Aggravated Driving While Intoxicated (DWI). After reporting this incident to the local security office as required by the DOE, the individual was called in for a Personnel Security Interview (PSI) in December 2002. During this PSI, the individual was referred to a psychiatrist (hereinafter referred to as "the DOE psychiatrist") for an agency-sponsored evaluation. The DOE psychiatrist produced a written evaluation of the individual, and sent that report to the local security office. After reviewing this report and the other information in the individual's personnel security file, the local security office determined that derogatory information existed that cast into doubt the individual's eligibility for a security clearance. The Manager of the local security office informed the individual of this determination in a letter that set forth in detail the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that she was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning her eligibility for access authorization. The individual requested a hearing on this matter. The

¹ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

Manager forwarded this request to the Office of Hearings and Appeals and I was appointed the Hearing Officer.

II. Statement of Derogatory Information

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraph (j) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8. Paragraph (j) defines as derogatory information indicating that the individual "has been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse." Under this paragraph, the Letter cites the individual's DWI arrests in August 2002 and March 1998, the DOE psychiatrist's evaluation that the individual suffers from alcohol abuse with insufficient evidence of rehabilitation or reformation, and information provided by the individual during the 2002 PSI indicating that she continues to consume an average of two glasses of wine per month. PSI at 26-27.

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting the individual a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that restoring access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). *See Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (*affirmed* by OSA, 1996), and cases cited therein. For the reasons that follow, I conclude that the individual has made this showing, and that her clearance should therefore be reinstated.

IV. THE HEARING

At the hearing, the individual presented the testimony of four co-workers, a friend, her boyfriend, a psychiatrist and herself to demonstrate that she does not suffer from alcohol abuse. The DOE psychiatrist testified for the DOE.

The DOE psychiatrist testified about his evaluation of the individual. He stated that he interviewed her for approximately an hour after reviewing her personnel security file. He also had blood and urine samples taken and analyzed, and administered a psychological test, the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). He then discussed his reasons for concluding that the individual suffers from alcohol abuse with inadequate evidence of rehabilitation or reformation.

The individual's alcohol-related arrests were a major factor in the DOE psychiatrist's conclusion that she suffers from alcohol abuse with insufficient evidence of rehabilitation or reformation. He testified that the individual's first arrest occurred in 1995. On this occasion, according to the DOE psychiatrist's report, the individual was attending a graduation party and accepted a ride from a friend to another party. During this ride, the individual's friend was arrested by the local police for DWI. At the time of the arrest, two other adults were in the vehicle, as well as a 17 year old minor and a half-consumed can of beer. DOE Exhibit 3 at 2. The DOE psychiatrist testified that the individual told him during their interview that the beer belonged to the minor. The individual was arrested for "Accessory - Riding with Suspected Drunk Driver," and contributing to the delinquency of a minor. The DOE psychiatrist testified that the individual informed him that she had "probably had a beer" at some unspecified point during that evening. Hearing Transcript (Tr.) at 113. He further stated that the minor had an open container of alcohol, and that he considered this to be the individual's first alcohol-related problem. *Id.*

The DOE psychiatrist then discussed the individual's 1998 DWI. He stated that he was particularly concerned about the "aggravated" nature of the offense (*i.e.*, that the individual's blood alcohol level was .16, which is twice the legal limit in her state). He noted that, given this level of intoxication, the individual's claim that she had four "Bloody Marys" prior to her arrest was "probably an understatement." According to the DOE psychiatrist, it would take "two to three times" that level of consumption to produce a reading of that magnitude. Tr. at 114.

This discrepancy, the DOE psychiatrist alleged, is part of the individual's pattern of minimization of her alcohol use, a pattern that continued with her 2002 DWI arrest. He referred to the police report, which lists the individual as having admitted to having four beers, the individual's written report of the incident to the DOE, in which she wrote that she had "consumed two beers," and her statement during her evaluation that she had had one beer. Tr. at

15. Also of concern to the DOE psychiatrist was what he termed the individual's refusal to take a breathalyzer test, Tr. at 115, and her repeated "pulling away" from the person who was attempting to draw blood from her for alcohol content testing. He said that the most likely cause of these actions was that the individual was concerned that the tests would show that her blood alcohol level was in excess of the legal limit. Tr. at 118. He also opined that there was insufficient evidence to indicate that the individual was rehabilitated or reformed from alcohol abuse, primarily because she did not believe that she had a drinking problem and because she continues to drink. Tr. at 122-123.

The individual testified on her own behalf. She estimated that over the last two years, she has consumed alcohol an average of one to two times a month, having no more than one drink with dinner on each occasion. Tr. at 20. She then discussed the alcohol-related arrests that the DOE psychiatrist relied on in making his diagnosis of alcohol abuse. She stated that on the occasion of her arrest for "Accessory - Riding with Suspected Drunk Driver" and contributing to the delinquency of a minor, she was riding with a friend and her friend's acquaintances when their car was stopped by the police. Because the individual's friend had made an illegal left turn, they questioned her as to whether she had been drinking. According to the individual, the police found alcohol in the rear seat of the car, where a minor was seated. Although the individual was riding in the front, she was arrested as well. She stated that she had not had anything to drink that day and that she was unaware of the presence of alcohol in the car until they were stopped. Tr. at 33-37.

The individual's latest alcohol-related arrest occurred in August 2002. She testified that she was socializing with her softball team at a local field after a game, and that she had consumed one beer and opened another one. Tr. at 43. At that time, a police officer drove up and ordered everyone who was not playing to leave the field. The individual stated that she then poured out the beer that she had opened, without drinking any of it, and drove to her home, which was about a mile from the field. Tr. at 43-44, 71-72. On her way home, she noticed that the same officer had followed her and had turned on his lights. The individual turned into her driveway and conversed with the officer in front of her home. Tr. at 44. She stated that she had known the officer since their high school days and that he had repeatedly asked her out on dates. She would customarily refuse because, she said, the officer was dating a friend of hers at the time. The individual added that she believed that the officer held a grudge against her because of her refusal to see him socially. Tr. at 45. When asked by the officer whether she had been drinking, the individual replied that she had been at the field and "'yes, my softball team was drinking some beers.'" Tr. at 45-46. The officer then performed a field sobriety test on the individual by asking her to stand on one leg and hold her other leg up. The individual stated that because she was wearing cleats and standing on pavement she was unable to maintain this position and "dropped [her] foot." Tr. at 46. The officer then arrested her for DWI.

The individual further testified that when they reached the local jail, the officer attempted to administer a breathalyzer test to her. However, because of her “really bad allergies,” whenever she would attempt to blow into the machine, she would start coughing, and would therefore be unable to complete the procedure. During this time, she continued, the officer “kept yelling at me, and he was pressuring me, and he said that . . . I was not being cooperative.” Tr. at 48.

After the officer’s attempts to administer the breathalyzer failed, the individual was transported to a local hospital, where medical personnel attempted to take a sample of the individual’s blood for alcohol content testing. She testified that during this trip, she informed the officer that it would be difficult to draw blood from her because she was deathly afraid of needles. This fear stemmed, she said, from the fact that she was raped while in college, and from the aftermath of that rape. Tr. at 49. After the rape, she was taken to a hospital where they performed “all these tests and [took] all these samples, and they kept drawing blood, and they kept poking me and . . . doing all these things to me with needles.” Tr. at 49-50. She later discovered that she had contracted two sexually transmitted diseases as a result of the rape, and that as a result of one of them, she has poor bladder control. She stated that although she informed the officer of this condition, he refused to let her use the toilet facilities at the jail, causing her to soil herself twice, once before her trip to the hospital for the blood draw, and once after her return to the jail. Tr. at 48, 52. At the hospital, the nurse tried to take a blood sample. The individual would attempt to cooperate until she actually started to bleed. Then she would pull her arm away. Tr. at 50-51. The officer “got very angry, and he said, ‘I’m sick and tired of playing games with you. . . . I’m going to throw the book at you. I’m going to charge you with an aggravated, because you’re not cooperating, I’m going to charge you with all these other things, and you’re going to jail,’ he said, ‘and I don’t care if you lose your . . . clearance or not, you’re going to jail.’” Tr. at 51. The individual later added that when she soiled herself the first time, the officer “mocked me and he laughed at me and seemed like he gained satisfaction out of seeing me humiliated.” Tr. at 52. As the result of an agreement with the municipality in which she was arrested, the individual paid court costs, performed community service and attended counseling sessions, and the DWI charge was dropped. Tr. at 53.

On cross-examination, the individual admitted that she was able to give a blood sample without incident in conjunction with the DOE psychiatrist’s evaluation. Tr. at 73. However, she added that, in contrast to her hospital experience subsequent to her arrest, the circumstances were not threatening and the nurse proceeded slowly, explaining the process and reassuring the individual as her blood was drawn. Tr. at 77-79.

Three co-workers and the individual’s boyfriend testified on the individual’s behalf. The co-workers all stated that they had known and worked with the individual for a period of years and had associated with her regularly outside of work, and that they had never seen the individual drink alcohol excessively or show any outward signs of inebriation. Moreover, all of them

indicated that they had not seen anything in the individual's behavior that would lead them to believe that she was suffering from alcohol abuse or dependence. Tr. at 85-103. The individual's boyfriend, who lives with the individual, said that she drinks "very little," and that they do not keep alcoholic beverages in their house. Tr. at 104-108.

A psychiatrist also testified on behalf of the individual. He stated that he has had significant experience in working with alcoholics and dealing with alcohol-related issues, including service with a volunteer study group at a prestigious eastern university that developed and tested the diagnostic criteria that are currently used in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (Text Revision)*. Concerning the individual's arrest for contributing to the delinquency of a minor, he testified that he did not consider this to be an alcohol-related incident for diagnostic purposes. This, the individual's psychiatrist said, is because "the point of the diagnostic criteria has to do with the actual involvement with the drinking relevant to impaired judgement about the drinking. This situation . . . doesn't meet those criteria either for the strict research criteria the DSM would use for a study . . . or for the clinical diagnosis that we'd use in practice." Tr. at 173-174. In essence, he concluded that there was insufficient evidence of alcohol adversely affecting her judgement for this to be considered an alcohol-related event. Tr. at 174.

The individual's psychiatrist further indicated that he was unable to diagnose the individual as suffering from alcohol abuse or dependence. He said that with such a diagnosis,

we're looking at a maladaptive pattern. It's the key to the diagnosis. . . .what strikes me about this case is there is no supporting evidence for the pattern. None. Now, I'm not talking about the preponderance of the evidence here, I'm talking about every work-related review that I read with a fine-tooth comb for every in-the-line or between-the-line characteristic. I'm talking about everybody that's ever worked with her or evaluated her. I'm not talking about preponderance of the evidence, I'm talking about a one hundred percent endorsement of the notion that [the individual] does not have a maladaptive pattern of alcohol use leading to what they call significant impairment or distress. . . . There wasn't one bit of supporting evidence to suggest something other than the one episode that was reviewed and the way in which her judgement led her to have that one – the one legitimate DWI episode [in 1998].

Tr. at 180-181. When it was pointed out on cross-examination that the individual had in fact been arrested again for DWI, in 2002, the individual's psychiatrist expressed serious reservations

about the validity of that arrest, believing that the individual's account of that incident was supported by the fact that the charge was later dismissed. Tr. at 196-197.²

The individual's psychiatrist opined that even if the DOE psychiatrist's April 2003 diagnosis of alcohol abuse had been accurate, he would still conclude that the individual had demonstrated sufficient evidence of rehabilitation or reformation. He based this conclusion on the six months of court-ordered substance abuse counseling that the individual received after the 2002 arrest and on the lack of any further alcohol-related incidents in the 18 months between the DOE psychiatrist's evaluation and the hearing. Tr. at 186.

During the course of the hearing, it became evident that one of the Exhibits submitted by the DOE had apparently been inadvertently omitted from the material provided to the individual. This Exhibit (DOE Exhibit 17) includes a Notice of Revocation of the individual's driver's licence based on the events surrounding the individual's August 2002 DWI arrest. Part of that Notice consists of a statement about the August 2002 arrest provided by the arresting officer. According to that statement, the officer concluded that the individual was intoxicated because when he stopped her, he noticed the odor of alcohol and that she had slurred speech and bloodshot, watery eyes. He further indicated that the individual told him that she had had four beers before driving home after the game. DOE Exhibit 17. Because the validity of this arrest is a key issue in this proceeding and to allow the individual an adequate opportunity to respond to the Exhibit, I granted the individual a continuance of the hearing to permit her to present additional testimony about the events leading up to her August 2002 arrest. The hearing was continued six days later, and the individual recalled her boyfriend and one of the co-workers who had testified earlier, and also presented the testimony of two new witnesses. Each witness testified about the events leading up to the individual's arrest.

The first of these four witnesses was a co-worker of the individual who also was in charge of the softball league in which the individual participated. She testified about her interaction with the individual. Right after the game, she said,

we just conversated [*sic*] for maybe five, ten minutes. I run the softball league, so right after the softball games, I give them about 10, 15 minutes to get to their cars and then I shut the lights off. Once the lights are shut off, everybody leaves. We

² The individual's psychiatrist also disagreed with the DOE psychiatrist's conclusion that the failed attempts to draw blood from the individual were more likely due to an unwillingness to cooperate than to any symptoms of Post-Traumatic Stress Disorder (PTSD). "Under the pressured [post-arrest] circumstances that [the individual] described, it's very likely – not just possible, but very likely – that the PTSD . . . symptoms would have been reactivated." Tr. at 189-190.

had . . . just said hello, how is it going . . . , exchanged a couple of words, and that was it. She went to her car. I turned off the lights. Everybody left the fields.

Q. Okay. Now, so when you talked to her, were you, would it be fair to say, within inches of her when you talked to her?

A. Yes.

Q. And it was right before she left the softball field?

A. Yes.

Tr. at 220-221. She went on to say that she did not notice the odor of alcohol on the individual's breath, and that the individual's speech was not slurred, nor were her eyes bloodshot and watery. *Id.* She added that there was nothing about the individual's physical movements or behavior that led her to believe that the individual was impaired in any way. Tr. at 222.

The other three witnesses testified essentially as this first witness did, *i.e.*, that they did not detect the odor of alcohol, slurred speech, watery or bloodshot eyes, or anything else that would lead them to believe that the individual was under the influence of alcohol, even though they had all stood in close proximity to the individual, and, in the case of her boyfriend, had even kissed her on the cheek. Tr. at 225-242. One of the three testified that he had seen the individual drink "a beer." Tr. at 230. Another said that she did not see the individual drink any alcohol. Tr. at 234. Finally, the individual's boyfriend also indicated that the individual told him at the time of her arrest of her belief that the officer was retaliating against her because she had refused to see him socially. Tr. at 240-241.

V. ANALYSIS

After reviewing this testimony and that given during the earlier portion of the hearing, along with the exhibits submitted by both parties, I found the testimony of the individual's psychiatrist that she does not suffer from alcohol abuse to be more convincing than the diagnosis of alcohol abuse and supporting testimony offered by the DOE psychiatrist. According to the DOE psychiatrist, the individual's three alcohol-related arrests and pattern of minimization of alcohol consumption support a diagnosis of alcohol abuse. However, I harbor serious doubts about two of these arrests, and I do not believe that there is sufficient evidence to support the existence of a pattern of minimization of alcohol use by the individual.

As previously stated, the first arrest, for Accessory - Riding with Suspected Drunk Driver, and contributing to the delinquency of a minor, occurred when the individual was riding with a friend and the friend's acquaintances from one party to another. The car was stopped by the police after the driver made an illegal turn, and alcohol was found in the back seat, in apparent proximity to a minor. According to the DOE psychiatrist, the individual told him during their interview that she "probably had a beer" at a party prior to the arrest. Tr. at 161. At the outset, I note that there is no obvious connection between the charges lodged against the individual and her alleged consumption of beer. Unlike the situation where someone is charged with Driving While Intoxicated, for example, here there is no indication that the individual exercised poor judgement regarding the use of alcohol, or while under the influence of alcohol. Indeed, the individual's psychiatrist opined that this incident should not be considered an alcohol-related legal problem for diagnostic purposes "because the point of the diagnostic criteria has to do with the actual involvement with the drinking relevant to impaired judgement about the drinking. This situation," he added, "doesn't meet those criteria." Tr. at 173. I agree.

Moreover, I cannot conclude, with any degree of certainty, that the individual consumed any alcohol at all in connection with this arrest. As set forth above, the individual denied having ingested any alcoholic beverage prior to her arrest. Although in circumstances such as this I would normally attribute greater weight to the disinterested testimony of the DOE psychiatrist, my confidence in the statement in his report that the individual was arrested "after consuming beer at a graduation party" is undermined by the existence of several factual inaccuracies in the report. During his testimony, the DOE psychiatrist admitted that his report (i) erroneously lists the individual's maternal grandfather twice in describing what he termed as a family history that is "positive for alcoholism," Tr. at 131; (ii) erred in linking a plea bargain that was reached with respect to the individual's first arrest to the individual's second arrest, Tr. at 151; and (iii) erroneously stated that the individual was 40 years old as of the date of the evaluation, when in fact the individual was 32 years old as of the date of the hearing. Tr. at 163-164, 9. For these reasons, I agree with the individual's psychiatrist that this arrest should not be considered to be "alcohol-related" for diagnostic purposes.

With regard to the third arrest, the testimony of the four witnesses to the individual's behavior after the softball game casts serious doubt upon the accuracy of the reasons provided by the arresting officer in his written statement for believing that the individual was driving under the influence of alcohol. Contrary to the information provided by the officer in the "Notice of Revocation," each of the four testified that, although they were in close proximity to the individual, she did not smell of alcohol, nor was her speech slurred or her eyes bloodshot and watery. Moreover, if the officer's statement as to the number of beers the individual drank is to be believed, she exhibited none of these characteristics nor any other visible signs of intoxication despite having consumed four beers in the relatively short period of time between the end of the game and the time that everyone left the field. I find this to be unlikely especially in light of the

testimony of one of the four that she did not see the individual drink any alcoholic beverage. I found the individual's claim that she consumed one beer to be more credible, and I have sufficient doubts about the validity of this arrest to exclude it from consideration in assessing the individual's eligibility for access authorization.³

The remaining DWI arrest, in 1998, and the individual's statement about the amount of alcohol that she consumed prior to that arrest, are part of what the DOE psychiatrist considered to be a pattern of minimization of admitted alcohol use on the part of the individual. During her July 7, 1998 PSI, the individual said that prior to her arrest, she drank four "Bloody Marys" over a two hour period. The DOE psychiatrist concluded that this claimed consumption was inconsistent with the individual's blood alcohol content of .16, as measured by a "breathalyzer" test administered to the individual after the arrest. Specifically, he testified that the individual's consumption would have to be "two or three times" as high as that claimed by the individual to produce a .16 blood alcohol content level. Tr. at 114. He later admitted, however, that there are a number of factors that could have influenced the individual's blood alcohol content, including the individual's sex and level of hydration, as well as whether she had recently consumed any food.⁴ He also indicated that because of these variables and because of his uncertainty as to the size of the drinks and the amount of alcohol in them, he could not state with certainty how much the individual had to drink that evening. Tr. at 140-142.

Given these facts, it is certainly possible that the individual did understate the number of drinks that she consumed prior to her arrest. However, even if I was to conclude that this is the case, this single incident would not constitute a pattern of minimization. Similarly, I agree with the individual's psychiatrist that this one arrest, as serious as it was, is insufficient to demonstrate the type of maladaptive pattern of alcohol use that is necessary for a diagnosis of alcohol abuse. Tr. at 181.

VI. CONCLUSION

For the reasons set forth above, I found the testimony of the individual's psychiatrist to be more convincing than the DOE psychiatrist's diagnosis of alcohol abuse and supporting testimony. In reaching this conclusion, however, I note that that diagnosis was predicated, to a significant

³ I note that in her report of this incident to DOE security, she wrote that she had had two beers. At the hearing, however, she explained this discrepancy by stating that she consumed one beer and had open a second, but poured it out when she and the other players were instructed to leave the field. Tr. at 43.

⁴ He added that these variables were "minor," and could not account for the large difference in the amount of consumption claimed by the individual and her measured blood alcohol content. Tr. at 140-141.

degree, on the validity of the individual's 2002 arrest, and that the DOE psychiatrist did not have access to the testimony of the four witnesses about the events leading up to that arrest.

Based on the factors discussed in this Decision, I find that the individual has demonstrated that reinstating her clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, the individual's access authorization should be restored.

Robert B. Palmer
Hearing Officer
Office of Hearings and Appeals

Date: **April 29, 2005**